(1)

88-353

No. _____

Supreme Court, U.S.
FILED
AUG 23 1988
JOSEPH E. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

LEO A. DEROSIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JAMES M. SHANNON
Attorney General

LINDA G. KATZ
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2814
(Counsel of Record)

QUESTIONS PRESENTED

1. Whether Steagald v. United States, 451 U.S. 204 (1981), requires suppression of a weapon seized from a defendant upon his arrest on probable cause in his mother's home, where the defendant was merely a visitor in the home, and where he opened the door to the police in response to their knock on the door.

2. Whether an arrest is warrantless within the meaning of Payton v. New York, 445 U.S. 573 (1980), where the arresting officers are in possession of an outstanding warrant from another state.

3. Where a suspect is wanted in New Hampshire for bail jumping and drug and weapons offenses, is probably armed, and may be forewarned of the arrival of the police, whether it is unreasonable for the police to arrest him inside a dwelling in Massachusetts without first obtaining a Massachusetts warrant.

TABLE OF CONTENTS

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.....2

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....8

I. THE DECISION BELOW, WHICH REQUIRES THE EXCLUSION OF EVIDENCE IN THE ABSENCE OF A SHOWING THAT THE DEFENDANT'S PRIVACY INTERESTS WERE INFRINGED, IS IN CONFLICT WITH DECISIONS OF THIS COURT.....8

II. THIS COURT SHOULD DECIDE WHETHER AN OUTSTANDING WARRANT FROM ANOTHER STATE SATISFIES THE FOURTH AMENDMENT WARRANT REQUIREMENT.....12

III. THIS COURT SHOULD ADOPT AND APPLY GUIDELINES FOR DETERMINING WHETHER EXIGENT CIRCUMSTANCES JUSTIFY A WARRANTLESS ARREST IN A DWELLING.....15

CONCLUSION.....19

APPENDIX A 1a

APPENDIX B 4a

TABLE OF AUTHORITIES

Cases

Commonwealth v. Derosia
402 Mass. 284,
522 N.E.2d 408 (1988).....passim

Commonwealth v. Sawyer
389 Mass. 686,
452 N.E.2d 1094 (1983).....13

Dorman v. United States
435 F.2d 385 (D.C.Cir. 1970).....16

Payton v. New York
445 U.S. 573 (1980).....passim

People v. Coto
199 Colo. 508,
611 P.2d 969 (1980).....15

People v. Wolgemuth
69 Ill.2d 154,
370 N.E.2d 1067 (1977),
cert. denied 436 U.S. 908 (1978)....14

Rakas v. Illinois
439 U.S. 128 (1978).....9, 10

Rawlings v. Kentucky
448 U.S. 98 (1980).....10

State v. Bradley
106 Idaho 358, 679 P.2d 635 (1983),
cert. denied, 464 U.S. 1041 (1984)..15

State v. Payano
528 A.2d 721 (R.I. 1987).....14

State v. Reasoner
154 Ariz. 377, 742 P.2d
1363 (Ariz. App. 1987).....14

Steagald v. United States
451 U.S. 204 (1981).....5, 7, 8

United States v. Carrion
809 F.2d 1120 (5th Cir. 1987).....11

United States v. Salvucci
448 U.S. 83 (1980).....11

United States v. Santana
427 U.S. 38 (1976).....11

United States v. Standridge
810 F.2d 1034 (11th Cir. 1987).....16

United States v. Watson
423 U.S. 411 (1976).....11

United States v. Whitten
706 F.2d 1000 (9th Cir. 1983).....11

Warden v. Hayden
387 U.S. 294 (1967).....18

Welsh v. Wisconsin
466 U.S. 740 (1984).....16

Statutes

28 U.S.C. §1257(3).....2

Mass. Gen. Laws, ch. 276, §20B.....2, 6

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

LEO A. DEROSIA,
Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS**

OPINIONS BELOW

The opinion of the Supreme Judicial Court below is reported at 402 Mass. 284, 522 N.E.2d 408 (1988), reproduced here as Appendix A, page 1a. The opinion of the District Court Department, Fitchburg Division is unpublished. It is reproduced here as Appendix B, page 4a.

JURISDICTION

The decision of the Supreme Judicial Court was entered on May 4, 1988. The Supreme Judicial Court denied a timely petition for rehearing on June 3, 1988. On July 29, 1988, Justice White signed an order extending the time for filing this petition for certiorari to and including August 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Mass. Gen. Laws, ch. 276, §20B

> The arrest of a person may be lawfully made also by any officer

> authorized to serve warrants in criminal cases, without a warrant, upon reasonable information that the accused stands charged in another state with a crime punishable by death or by imprisonment for a term exceeding one year, but when so arrested the accused shall be taken with all practicable speed before a court or justice authorized to issue warrants in criminal cases and complaint shall be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.

STATEMENT OF THE CASE

At approximately 8:00 p.m. on January 5, 1986, police in Gardner, Massachusetts received a telephone call from a Keene, New Hampshire police officer regarding the respondent, Leo A. Derosia. The Gardner Police were informed that Derosia, who was wanted on a New Hampshire capias warrant for bail jumping, and for firearm and drug offenses, was at a certain address in Gardner. The Keene police provided a detailed description of

Derosia, and informed the Gardner police that Derosia was armed with a .32 caliber handgun, and probably had a police scanner. A Gardner police officer was dispatched to watch the house. When he questioned two people whom he saw exit the address, he was told that Derosia was inside.

By approximately 9:00 p.m., after further investigation, the police contacted an assistant court clerk, who advised them that it was not necessary to obtain a Massachusetts warrant. The police then formulated their plans to effect the arrest. They were in possession of the New Hampshire capias warrant at this time.

Four or five officers went to the address, which was the home of Derosia's mother, and one knocked on the door to her apartment. Derosia opened the door, and

the police immediately entered. Upon frisking Derosia, the police found a .32 caliber handgun in his waistband. He was taken into custody, and the next day a complaint issued in Gardner District Court, charging Derosia with unlawfully carrying a firearm, M.G.L. ch. 269, §10(a).

Prior to his trial in the jury session, respondent filed a motion to suppress the firearm. He claimed, inter alia, that the arre t and search were conducted in violation of the Fourth Amendment to the United States Constitution. The District Court judge granted the motion. He held that "since there were no exigent circumstances and the defendant was inside the private residence of another," under Payton v. New York, 445 U.S. 573 (1980) and Steagald v. United States, 451 U.S. 204 (1981), a warrantless arrest was barred by the

Fourth Amendment. (Findings of Fact and Rulings of Law on Defendant's Motion to Suppress) (Appendix B, 10a). The Court further held that the New Hampshire warrant had no effect in Massachusetts, and that M.G.L. ch. 276, §20B, which permits the warrantless arrest of fugitives, would be unconstitutional if construed as permitting a warrantless arrest in a residence. Hence, the Court refus d to so construe the statute. (Appendix B, 15a, 18a).

The Court did not address the question whether the defendant had a reasonable expectation of privacy in his mother's home. The sole facts bearing on this issue as found by the Court were that the defendant was a visitor in the house: "He was not living there and did not intend to sleep there that evening." (Appendix B, 8a).

The Commonwealth was granted leave to appeal the suppression order. On appeal, it argued that Steagald v. United States, supra, and Payton v. New York, supra, did not apply because the defendant was merely a transient guest with no reasonable expectation of privacy in his mother's residence. It further argued that the arrest was lawful under the principles of Payton, because the arrest was based on a New Hampshire indictment and capias Hence, a neutral and detached determination of probable cause had been interposed between the police and the defendant. Finally, the Commonwealth argued that the arrest was justified by exigent circumstances.

In a terse opinion, the Supreme Judicial Court rejected the Commonwealth's arguments. Specifically noting that it was deciding the case under the United

States Constitution, the Court held that a Massachusetts warrant was required, and that the lower court therefore had properly allowed the motion to suppress.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, WHICH REQUIRES THE EXCLUSION OF EVIDENCE IN THE ABSENCE OF A SHOWING THAT THE DEFENDANT'S PRIVACY INTERESTS WERE INFRINGED, IS IN CONFLICT WITH DECISIONS OF THIS COURT.

In reaching the conclusion that the Fourth Amendment required suppression of the firearm, the Supreme Judicial Court misconstrued the holding in Steagald v. United States, 451 U.S. 204 (1981), and therefore bypassed completely the question whether respondent (the defendant below) had any reasonable expectation of privacy in his mother's home. In Steagald, this Court held that law enforcement officers may not legally search for the subject of an arrest warrant in the home of a third

party without first obtaining a search warrant. However, that case was based on the Fourth Amendment rights of a resident of the dwelling. Logically, Steagald should have little, if any, bearing on the question in this case, since respondent was not a resident of his mother's home, and since no search of the premises was involved. Rather, the controlling precedents from this Court include Payton v. New York, 445 U.S. 573 (1980), and Rakas v. Illinois, 439 U.S. 128 (1978).

In Payton v. New York, this Court set forth the basic principle that, absent exigent circumstances, the police may not enter a suspect's own home to arrest him or her without a warrant. In Rakas v. Illinois it was acknowledged that one can have a legitimate expectation of privacy in a place other than his or her own home. However, Rakas also makes clear

that the mere fact that one is legitimately on the premises which have been searched does not mean she or he can claim the protection of the Fourth Amendment. "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." 439 U.S. at 131, n.1.

In the instant case, Derosia made absolutely no showing that he had a reasonable expectation of privacy at his mother's house which was violated by the police intrusion. The opinion of the Supreme Judicial Court thus conflicts with Rakas v. Illinois and other opinions of this Court which reaffirm the principle that "Fourth Amendment rights are personal rights that may not be asserted vicariously . . ." Id. at 133. See also, e.g., Rawlings v. Kentucky, 448 U.S. 98,

104 (1980); United States v. Salvucci, 448 U.S. 83 (1980).

Moreover, the state court failed to consider the significance of the fact that Derosia answered the door, thus voluntarily exposing himself "to public view, speech, hearing, and touch." United States v. Santana, 427 U.S. 38, 42 (1976). In Santana, this Court held that a suspect who was standing in the doorway to her house when the police first sought to arrest her had no expectation of privacy. The court held that the doorway was a public place. Thus, under United States v. Watson, 423 U.S. 411 (1976), no warrant was necessary. See also, e.g., United States v. Carrion, 809 F.2d 1120, 1128 (5th Cir. 1987); United States v. Whitten, 706 F.2d 1000, 1015 (9th Cir. 1983).

II. THIS COURT SHOULD DECIDE WHETHER AN OUTSTANDING WARRANT FROM ANOTHER STATE SATISFIES THE FOURTH AMENDMENT WARRANT REQUIREMENT.

In characterizing the arrest as "warrantless," the Supreme Judicial Court implicitly rejected the Commonwealth's argument that the New Hampshire capias satisfied the Fourth Amendment Warrant requirement. It is submitted that this decision is in conflict with at least the reasoning, if not the precise holding of Payton v. New York. The requirement of an arrest warrant in Payton was intended "to interpose a magistrate's determination of probable cause between the zealous officer and the citizen." 445 U.S. at 602. Here, that function was performed by a New Hampshire judicial officer. It offends notions of comity and federalism to conclude, as the Supreme Judicial Court implicitly has, that federal constitu-

tional principles require the additional interposition of a Massachusetts judicial officer before the suspect may be arrested in a Massachusetts dwelling.

Further, it invites contradictory results even with respect to the same evidence. If the weapon seized from Derosia were to be offered in a New Hampshire prosecution, the courts of that jurisdiction might well conclude upon a motion to suppress that their own warrant did satisfy the Payton requirement, notwithstanding the fact that the arrest took place outside that state's borders.

In ruling as it did, the Supreme Judicial Court inexplicably failed to follow even its own prior decision on this very issue. In Commonwealth v. Sawyer, 389 Mass. 686, 452 N.E.2d 1094 (1983), the Supreme Judicial Court held that where a suspect was arrested inside his hotel room

in Maine on the basis of information that a warrant had been issued in New York, "the arrest itself was not warrantless within the meaning of Payton v. New York, supra." 389 Mass. at 695, 452 N.E.2d at 1099.

The state courts of last resort in Rhode Island and Illinois have also concluded that when a suspect is arrested in one state on the basis of a warrant issued by another state, the Payton warrant requirement has been met. State v. Payano, 528 A.2d 721, 724-25 (R.I. 1987); People v. Wolgemuth, 69 Ill.2d 154, 370 N.E.2d 1067, 1070 (1977), cert. denied 436 U.S. 908 (1978). See also State v. Reasoner, 154 Ariz. 377, 742 P.2d 1363, 1366-67 (Ariz. App. 1987). However, the Supreme Courts of Idaho and Colorado have taken the contrary position that the

Payton warrant requirement is not met by an out-of-state warrant. State v. Bradley, 106 Idaho 358, 679 P.2d 635 (1983), cert. denied, 464 U.S. 1041 (1984); People v. Coto, 199 Colo. 508, 611 P.2d 969 (1980). Thus, this Court should grant certiorari in order to resolve the conflict amongst these various state courts.

III. THIS COURT SHOULD ADOPT AND APPLY GUIDELINES FOR DETERMINING WHETHER EXIGENT CIRCUMSTANCES JUSTIFY A WARRANTLESS ARREST IN A DWELLING.

The Supreme Judicial Court concluded that there were no exigent circumstances to justify the challenged entry. In so ruling, it is submitted that the Court below failed to apply an appropriate standard. This case thus provides an occasion, not present in Payton v. New York, supra, "to consider the sort of emergency or dangerous situation,

described . . . as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of . . . arrest." Id., 445 U.S. at 583.

In Dorman v. United States, 435 F.2d 385, 392-93 (D.C.Cir. 1970), the en banc United States Court of Appeals for the District of Columbia Circuit set forth a number of factors it deemed material to making the determination whether a warrantless arrest in a dwelling is reasonable. See also, e.g., United States v. Standridge, 810 F.2d 1034, 1037 (11th Cir. 1987). In Welsh v. Wisconsin, 466 U.S. 740, 752 (1984), this Court acknowledged that at least the first factor set forth in Dorman - gravity of the offense - was an important consideration in the constitutional analysis. This case provides an

opportunity for this Court to address the other Dorman factors, and thereby provide more specific guidelines for the lower courts.

In this case, application of the standard adopted in Dorman shows that the search was indeed reasonable. Derosia was a fugitive, wanted for firearm and drug charges, as well as bail jumping. Thus, there was a substantial risk of flight. The police had reason to believe that he was armed, and that he might be forewarned of their arrival, either by a telephone call from the visitors who had been questioned by the police, or through use of a police scanner. These various factors would lead reasonable, prudent law enforcement officers to believe that a failure to act with haste would increase the risk of danger not only to themselves, but possibly to the public at large if it

became necessary to make the arrest on the street. "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." Warden v. Hayden, 387 U.S. 294, 298-99 (1967). Where the police have probable cause to believe that a suspect is armed, that fact alone ought to justify a decision to act with all due hast .

Further supporting a finding of reasonableness is the manner in which the entry occurred. The police used no force, and conducted no search of the house itself. They acted promptly upon receipt of the information. In these circumstances, it is submitted that the arrest without a Massachusetts warrant was not unreasonable under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts should be granted.

Respectfully submitted,

JAMES M. SHANNON
Attorney General

LINDA G. KATZ
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200 ext. 2814
(Counsel of Record)

APPENDIX A

COMMONWEALTH *vs.* LEO A. DEROSIA.

Worcester. April 6, 1988. — May 4, 1988.

Present: HENNESSEY, C.J., LIACOS, ABRAMS, NOLAN, & LYNCH, JJ.

Search and Seizure, Home of third person. *Constitutional Law*, Search and seizure.

Where police officers made a warrantless entry into the dwelling of a suspect's mother in which he was a lawful visitor, frisked the suspect, found a pistol in his waistband, and then arrested him, the police activity, in the absence of any showing of exigent circumstances or consent, was not justified under the Fourth Amendment of the Federal Constitution, and consequently, the judge properly allowed a motion to suppress as evidence the firearm seized by the police. [286]

COMPLAINT received and sworn to in the Gardner Division of the District Court Department on January 6, 1986.

On appeal to the jury session of the Fitchburg Division, a pretrial motion to suppress evidence was heard by *Thomas F. Sullivan, Jr.*, J.

An application for an interlocutory appeal was allowed by *Wilkins*, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by him.

Katherine E. McMahon, Assistant District Attorney, for the Commonwealth.

Peter K. Binder for the defendant.

NOLAN, J. As a result of a search and a seizure of a firearm from his person on January 5, 1986, the defendant was found guilty at a bench trial of unlawfully carrying a firearm. He appealed to the jury session, and before trial, he filed a motion to suppress the firearm. The judge allowed the motion. The Commonwealth appealed and a single justice of this court allowed the Commonwealth's application for interlocutory appeal. We affirm.

We have the benefit of the motion judge's thoughtful findings of fact from which we learn that an officer of the police department of Keene, New Hampshire, received a telephone call from an anonymous informant on January 5, 1986. The caller told the police officer that the defendant was in the area and armed with a .32 caliber handgun. This police officer knew that a capias had been issued on a New Hampshire indictment for arrest of the defendant for his defaulting on a bail bond, and for weapons and narcotics offenses. Armed with another report as to the defendant's location, this police officer telephoned a home in Gardner, Massachusetts. The telephone was answered by the defendant (the officer recognized his voice). A check of the telephone records indicated that the residence called was that of the defendant's mother in Gardner.

The police officer in Keene then telephoned a police officer in Gardner and told him that the defendant was in Gardner, in his mother's home, was armed, probably had a police scanner, and that he was wanted on a capias in New Hampshire for a weapons offense. He told the Gardner police officer that the defendant may be operating a motor vehicle with Texas registration plates, and furnished a detailed description of the defendant. The Gardner police officer confirmed the existence of the weapons charge, as well as the default on the bail bond and his outstanding narcotics offenses by using a computer terminal linked to the National Crime Information System. The Keene police department sent the capias to the Gardner police and, on receipt of it, the Gardner police went to the residence of the defendant's mother. Two persons emerged from the residence and drove away. A police officer stopped them and asked whether the defendant was present in his mother's home. The driver acknowledged the defendant's presence in the house, but he said that he did not know whether the defendant was armed at the time.

This police officer then telephoned an assistant clerk of the local District Court and told him of the defendant's location and the capias. The assistant clerk advised the police officer that a warrant for the defendant's arrest was not necessary. Several police officers went to the residence of the defendant's

mother. One police officer knocked on the door. The defendant responded. The police entered the apartment, frisked the defendant, found a pistol in his waistband, and then arrested him.

We are deciding this case under the United States Constitution under which, absent exigent circumstances, police may not make a warrantless entry into a person's dwelling to arrest him or to seize evidence. *Payton* v. *New York*, 445 U.S. 573, 587-589 (1980). *Commonwealth* v. *Forde*, 367 Mass. 798, 800 (1975), and cases cited. It is true that the defendant was not in his own dwelling. He was a visitor lawfully in the home of his mother. Our law is clear that in these circumstances, absent exigency or consent, a search or arrest warrant must first be obtained before police may enter the home of a third person in search of a suspect. *Steagald* v. *United States*, 451 U.S. 204, 205-206 (1981).

In this case, there were no exigent circumstances to justify a warrantless entry into the dwelling of the defendant's mother. The provision for a warrantless arrest in G. L. c. 276, § 20B (1986 ed.),[1] does not advance the Commonwealth's position because the statute does not authorize an entry into a dwelling to effectuate a warrantless arrest.

The judge was correct in allowing the defendant's motion to suppress the firearm seized on his person in his mother's home.

So ordered.

---

[1] General Laws c. 276, § 20B provides: "The arrest of a person may be lawfully made also by any officer authorized to serve warrants in criminal cases, without a warrant, upon reasonable information that the accused stands charged in another state with a crime punishable by death or by imprisonment for a term exceeding one year, but when so arrested the accused shall be taken with all practicable speed before a court or justice authorized to issue warrants in criminal cases and complaint shall be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant."

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. District Court Department
Fitchburg Division
Six Person Jury Session
No. 8616/JC/0890-A

COMMONWEALTH
v.
LEO A. DEROSIA

Findings of Fact and Rulings of Law on Defendant's Motion to Suppress

On January 5, 1986, Officer Edward Gross of the Keene, New Hampshire Police Department received a phone call from an informant in the Keene area. The informant told the officer that the defendant was in town and was in possession of a 32 caliber handgun. The officer knew that an active capias had been issued for the defendant's arrest. The capias was for firearms, drug, and bail jumping charges. The officer also knew the defendant from prior dealings and

had arrested him for sale of a controlled substance. Officer Gross read another officer's report on additional alleged criminal activity of the defendant. The officer made a telephone call to a phone number in Gardner, Massachusetts and heard the voices of a woman and a man and recognized the defendant's voice. The officer did not identify himself and feigned trouble with the connection. After the call, the telephone company provided the officer with the address in Gardner where the phone number was located. At about 8:00 p.m., the officer telephoned the Gardner Police Department and spoke to them about the defendant. Among other information, the officer told the Gardner officer, Officer Janowski, that defendant was wanted on a weapons charge, was carrying a 32 caliber handgun, and probably had a police scanner. The

officer asked the Gardner officer to run a check on the defendant on his National Crime information terminal. The Gardner officer, employing his computer, verified that defendant was wanted in Keene for narcotics, weapons, and bail jumping charges.

Officer Gross provided a detailed, accurate description of the defendant, and told Officer Jankowski that he might be operating a motor vehicle with a Texas registration plate.

Officer Gross had the original of the Keene capias relayed through various police departments, to the Gardner Police station. Officer Arsenault of the Gardner Police Department was dispatched to watch 260 Main Street, the house in which the defendant had answered the phone earlier. At about 9:00 p.m., Officer Arsenault saw two people exit the 260 Main Street

address and drive from the area. The officer stopped the motor vehicle and questioned the driver who told the officer that he had just seen the defendant in his mother's home but did not know if the defendant was in possession of a handgun.

Officer Jankowski contacted Assistant Clerk Arthur Boudreau at about 9:00 p.m., and advised him of the situation. Mr. Boudreau advised the officer that a Massachusetts warrant would not be necessary.

At this time, the Keene capias arrived at the station and plans were formulated to arrest the defendant. The house in question was still under surveillance. Four or five officers went to the location and surrounded the house. Officer St. Laurent knocked on the door, defendant opened the door, and the officers entered the apartment. Officer St. Laurent

frisked defendant's waist area and found the pistol. Then Officer St. Laurent began questioning defendant and kept asking him if he was Leo Derosia. After a few minutes of questioning, the defendant was arrested inside the apartment.

The defendant was visiting at his mother's house at the time. He was not living there and did not intend to sleep there that evening.

The Commonwealth argues that Chapter 276 of the Massachusetts General Laws provides authority for a warrantless entry into the residence of another to arrest the defendant. The Commonwealth asks the court to rule that M.G.L. ch. 276, 20B allows an arrest without an arrest or search warrant in any place including one's own residence or the residence of another. Chapter 276 provides:

M.G.L. Ch 276, §20A

Whenever any person within this commonwealth shall be charged, on the oath of any credible person before any court or justice in this commonwealth authorized to issue warrants in criminal cases, with the commission of any crime in any other state, including cases arising under section thirteen, or with having been convicted in such other state and having escaped from confinement or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any such court or justice in this commonwealth setting forth, on the affidavit of any credible person in another state, that a crime has been committed in such other state and that a person has been charged in such state with the commission of a crime, including cases arising under section thirteen or with having been convicted of a crime in that state and having broken the terms of his bail, probation or parole, and is believed to be in this commonwealth, such court or justice may issue a warrant directed to any officer authorized to serve warrants in criminal cases commanding him to apprehend the person named therein, wherever he may be found in this commonwealth, and bring him before the same or any other such court or justice convenient of access to the place where the arrest may be made to answer the charge or complaint and affidavit; and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

M.G.L. Ch 276, §20B

> The arrest of a person may be lawfully made also by any officer authorized to serve warrants in criminal cases without a warrant, upon reasonable information that the accused stands charged in another state with a crime punishable by death or by imprisonment for a term exceeding one year, but when so arrested the accused shall be taken with all practicable speed before a court or justice authorized to issue warrants in criminal cases and complaint shall be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if he had been arrested on a warrant.

Section 20A and 20B of Chapter 276 are similar to Sections 13 and 14 of the Uniform Criminal Extradition Act.

Since there were no exigent circumstances and the defendant was inside the private residence of another, a warrantless entry into this dwelling to arrest a defendant for any crime committed in this Commonwealth would have been barred by the Fourth Amendment. Steagald

v. United States, 451 U.S. 204 (1981); Payton v. New York, 445 U.S. 573 (1980); United States v. Santana, 427 U.S. 38 (1976); Commonwealth v. Forde, 307 Mass. 798 (1978); Commonwealth v. Huffman, 385 Mass. 122 (1982).

In Payton, the Supreme Court, in strong language, struck down a New York statute which allowed the police to enter a private residence without a warrant to make a felony arrest. There was probable cause to arrest in each case. Payton was wanted for murder and Riddick was sought for two armed robberies, but in both cases the police went to their homes without an arrest warrant to arrest them for the above mentioned crimes. The police broke into Payton's home, but at Riddick's residence, his son answered the door and the police immediately saw Riddick sitting therein. The court held that the statute

was unconstitutional on the grounds that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home to make a felony arrest. The reasons for upholding warrantless arrests in a public place, United States v. Watson, 423 U.S. 411 (1976), do not apply to warrantless invasions of the pı vacy of the home. In Payton, supra at 588, the court summarized its position:

> To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home. This is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is present. United States v. Reed, 272 F.2d 412, 423 (1978).

In Steagald, the Supreme Court held that, absent exigent circumstances or consent, law enforcement officers could not legally search for the subjects of an

arrest warrant in the home of a third party, without first obtaining a search warrant. In Steagald, a DEA agent was contacted in Detroit about a federal fugitive, Ricky Lyons, wanted on drug charges. An informant told the agent that Lyons was now in Atlanta and can be contacted at a certain phone number. This information was relayed to another agent in Atlanta, who discovered that Lyons was the subject of an arrest warrant valid at that location. The agent, having secured an address from the telephone company, went to Steagald's home to arrest Lyons, and searched this home looking for Lyons. Cocaine belonging to Steagald was found during the search for Lyons. The narrow issue before the court was whether an arrest warrant, as opposed to a search warrant, was adequate to protect the Fourth Amendment interests of persons not

named in the warrant, when their homes are searched without their consent and in the absence of exigent circumstances. The Supreme Court in no uncertain terms condemned the use of an arrest warrant in such a case because an arrest warrant, to the extent that it is invoked as authority to enter the homes of third parties, suffers from the same infirmitie; a general warrant and writ of assistance which were condemned by the framers of the constitution. An arrest warrant specifies only the object of the search and leaves to the unfettered discretion of the police. [sic] The decision as to which particular homes should be searched. The Supreme Court considered the practical problems such as the inherent mobility of persons as opposed to objects that might arise if the police are required to obtain search warrants. However, the Supreme

Court was of the opinion that the Constitutional Rights to be protected outweighted [sic] the practical problems police might encounter.

> Whatever practical problems remain, however, cannot outweigh the constitutional interests at stake. Any warrant requirement impedes to some extent the vigor with which the Government can seek to enforce its laws, yet the Fourth Amendment recognizes that this restraint is necessary in some cases to protect against unreasonable searches and seizures. We conclude that this is such a case. The additional burden imposed on the police by a warrant requirement is minimal. In contrast, the right protected - that of presumptively innocent people to be secure in their homes from unjustified, forcible intrusions by the Government - is weighty. Thus, in order to render the instant search, reasonable under the Fourth Amendment, a search warrant was required.

The New Hampshire arrest warrant was only valid within the jurisdiction of the sovereignty from which it was issued. Cohen v. Saddlemire, 26 F. Supp. 27 (1939) (State process in Massachusetts does not

extend to a sister state); Ex Parte Graves, 236 Mass. 493 (1920); Mitchell v. Dexter, 244 F. 926 (1917) (Wisconsin Court without authority to issue a writ for arrest of Dexter in Massachusetts); Palmer v. Thompson, 20 App. D.C. 273; People v. Martin, 76 N.Y.S. 953, 955 (Statutes of one state have, ex proprio vigore, no force or effect in another); Sullivan v. Wentworth, (1884) [sic]; Commonwealth v. Foster, 1 Mass. 488 (1805). In this Commonwealth, an arrest warrant must be specifically directed to some officer or class of officers authorized to serve criminal process in Massachusetts. Ex Parte Graves, supra; Commonwealth v. Foster, supra; MGL c. 276, 23; MGL c. 218, 37; Mass. R. Crim. P. 6(c)(1).

The New Hampshire arrest warrant plus the other information the police possessed clearly provided grounds for the issuance

of a search warrant pursuant to MGL c. 276, §1-3 and an arrest warrant pursuant to MGL c. 276, 20A. A Clerk of the District Court has authority to issue a warrant under MGL 276, 20A. Thompson v. Globe Newspaper Co., 279 Mass. 176 (1932). The function of a fugitive warrant issued under Section 13 of the Uniform Criminal Extradition Act or MGL c. 276, 20A is to provide for the arrest and detention of an alleged fugitive pending the institution of an extradition proceeding. State ex Rel. Wells v. Hanley, 27 N.W.2d 373 (1947). The issuance of a fugitive warrant is a separate proceeding from the issuance of a rendition warrant by the governor for the extradition of a person to another state. State ex Rel. Wagner v. Hedman, 195 N.W.2d 420 (1972); In Re Chenowith, 432 P.2d 132 (1967).

The enactment of 20A demonstrates that the legislature did not intend that every fugitive arrest be made without a warrant. This court is mindful of the canons of statutory construction that a statute must be construed so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score, and that all rational presumptions are made in favor of the validity of every legislative enactment. Alegata v. Commonwealth, 231 N.E.2d 201 (1967). Yet there is no escape from the conclusion that 20B would be unconstitutional if it allowed the warrantless arrest of a fugitive in a residence absent exigent circumstances, therefore, it is the opinion of this court that MGL c. 276, 20B must be governed by the limitations imposed by Payton and Steagald. Thus, a warrantless arrest

absent exigent circumstances, such as we have in the instant case, violates the Fourth Amendment. Such an interpretation of 20B will not hamper law enforcement. Steagald v. United States, supra at 1653. The problems inherent in interstate cases were present in Steagald and are encountered daily by federal agents. Fugitive arrests without a warrant under 20B will still be permitted in any place outside of a residence, United States v. Watson, supra, and inside of a residence if exigent circumstances exist or if the police are in hot pursuit of a fugitive. This court need not decide today whether an arrest warrant would have been sufficient in the present case since the defendant was arrested prior to any search and the revolver was found on his person and not as a result of a search of the house.

The defendant's warrantless arrest inside his mother's home and the subsequent seizure of the revolver were illegal. Accordingly, the Motion to Suppress is allowed.

/s/
Thomas F. Sullivan, Jr.
Associate Justice

Dates:[sic] December 26, 1986

Supreme Court, U.S.
FILED
NOV 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-353

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

LEO A. DEROSIA,
Respondent

PETITION FOR DENIAL OF WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FOR LEO A. DEROSIA

LEO A. DEROSIA
By his Attorney

Peter K. Binder
(Nancy M. Martin
with him)
BINDER & MARTIN
38 Parker Street
Gardner, MA 01440
(508) 632-7939
(Counsel of Record)

TABLE OF CONTENTS

REASONS FOR DENYING THE WRIT 1

I. THE DECISION BELOW WAS CORRECT IN THAT THE DEFENDANT HAD A REASONABLE EXPECTATION OF PRIVACY IN HIS MOTHER'S HOME. THIS IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT. . . .1

II. WHAT VALIDITY TO GIVE A FOREIGN WARRANT WITHIN MASSACHUSETTS IS A MATTER OF STATE LAW, NOT FEDERAL CONSTITUTIONAL LAW. . 6

III. THE COURT BELOW APPLIED THE APPROPRIATE STANDARD AS TO EXIGENT CIRCUMSTANCES 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Commonwealth v. Derosia
402 Mass. 284
522 N.E. 2d 408 (1988). . passim

Commonwealth v. Forde
367 Mass. 798
369 N.E. 2d 717 (1975). 10

Commonwealth v. Pietras
392 Mass. 892
467 N.E. 2d 1368 (1984). 10

Dorman v. United States
435 F.2d 385 (D.C.Cir. 1970). . 9

Jones v. United States
362 U.S. 257 (1960). 3

Katz v. United States
389 U.S. 347 (1967). 3

Payton v. New York
445 U.S. 573 (1980). 4

People V. Wolgemuth
69 Illinois 2d 154 370 N.E.2d
1097 (1977) cert. denied, 436
U.S. 908 (1978). 7

Rakas v. Illinois
439 U.S. 128 (1978). . . . 2, 3, 4

Rawlings v. Illinois
448 U.S. 98 (1980). 4

State v. Bradley
154 Idaho 358, 679 p.2d 635 (1983)
cert. denied, 464 U.S.1041 (1984). .8

State v. Reasoner
154 Ariz. 377, 742 P.2d
1363 (Ariz. App. 1987). 7

United States v. Salvucci
448 U.S. 83 (1980). 5

United States v. Santana
427 U.S. 38 (1976). 6

Statutes

Mass. Gen. Laws, ch. 218, sec. 32. . . 6

No. 88-353

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

LEO A. DEROSIA,
Respondent,

PETITION FOR DENIAL OF WRIT OF CERTIORI TO THE SUPREME COURT OF THE UNITED STATES FOR LEO A. DEROSIA

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS CORRECT IN THAT THE DEFENDANT HAS A REASONABLE EXPECTATION OF PRIVACY IN HIS MOTHER'S HOME. THIS IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

The Petitioner's first argument for granting the writ of certiori is that the Supreme Judicial Court of Massachusetts failed to address whether Respondent had

a reasonable expectation of privacy in his mother's home, and therefore, the decision in Commonwealth v. Derosia, 402 Mass 284 (1988) is in opposition to other decisions of this court.

The primary case cited by the petitioners in support of their position is Rakas v. Illinois, 439 U.S. 128 (1978). In this case the criminal defendants were passengers in an automobile that was stopped and searched. A rifle was found under the front seat and shells were found in the glove box. The defendants had neither a property nor a possessory interest in the automobile and asserted no interest in the rifle or shells found therein. The court held that the fact that the criminal defendants were "Legitimately in the car, with the permission of the owner, was, in itself, not enough to give them a ligitimate expectation of privacy in the particular areas of the

automobile searched".

In the case at hand, Derosia was in his mother's home when he answered a knock at the door and was arrested and searched by members of the Gardner Police Department. A handgun was found in the waistband of his pants. Katz v. United States, 389 U.S. 347 (1967) developed the justified expectation of privacy approach to the Fourth Amendment cases. Other than one's own home, it is hard to imagine a place where the expectation of privacy is greater than that of one's parents' home. Rakas v. Illinois, at 142, states that... "The phrase legitimately on the premises coined in Jones v. United States, 362 U.S. 257 (1960) creates too broad a gauge for measurement of Fourth Amendment rights". However, this court goes on in Rakas v. Illinois, to state that Jones does stand for "...the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home

so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place".

The foundation of the Fourth Amendment jurisprudence is that one's legitimate expectations of privacy are most pronounced in the home. See Payton v. New York, at 445 U.S. 573 (1980) at 586 where this court held that a warrantless arrest within a private residence is "Presumptively unreasonable".

It would seem that the opinion of the Supreme Judicial Court in Derosia is in agreement with Rakas v. Illinois, not in conflict with it. Here, Derosia asserts his Fourth Amendment rights as a result of a warrantless arrest and search of his person while he was visiting at his mother's home. Unlike the defendants in Rakas, Derosia claims ownership in the property seized.

Rawlings v. Kentucky, 448 U.S. 98

(1980) and United States v. Salvucci, 448 U.S. 83 (1980) are not germane to the case at hand. In Rawlings, drugs belonging to Rawlings were found in another's purse and this court said there was no legitimate expectation of privacy in the purse to allow Rawlings to challenge the validity of the search. In Salvucci, the defendants were charged with possession of stolen mail. The checks that formed the basis of the charge had been seized during a search conducted pursuant to a warrant for the apartment rented by one of the defendant's mother. It appears that the defendant was not present at the apartment when the search was made and that the search was pursuant to a warrant, facts notably different from those in Derosia.

In like manner, the facts of Derosia are different than those found in United

States v. Santana, 427 U.S. 38, (1976). In Santana the defendant was standing in the open doorway of her house when the police arrived. Derosia was behind the closed door of his mother's home which was only opened as a result of actions initiated by the police.

II. WHAT VALIDITY TO GIVE A FOREIGN WARRANT WITHIN MASSACHUSETTS IS A MATTER OF STATE LAW, NOT FEDERAL CONSTITUTIONAL LAW.

The fact that the Supreme Judicial Court rejected the Commonwealth's argument that the New Hampshire capias satisfied the Fourth Amendment warrant requirement is not an appropriate reason to grant certiorari. What validity to give to a foreign warrant within Massachusetts is a matter of state law, not federal law. In Massachusetts, the power to issue warrants is controlled by statute. (Chapter 218, Section 32 of the Massachusetts General laws authorizes

District Courts to receive complaints and issue warrants. Chapter 276, Section 22 governs the procedure to be followed. These are augmented by Chapter 218, Section 33, which provides that "a clerk (or) assistant clerk...may receive complaints, administer to complainants the oath required thereto, and issue warrants").

There is no statutory authority and no Massachusetts case law giving an out of state capias the same jurisdictional value as a warrant issued pursuant to the Massachusetts statutory law. In People v. Wolgemuth, 69 Illinois 2d 154, 370 N.E. 2d 1067, (1977), cert denied 436 U.S. 908 (1978), the Illinois Supreme Court ruled that an Iowa warrant could be used to make a valid in-home arrest in Illinois. However, Illinois had a statute that specifically authorized arrests on warrants from other jurisdictions.

In a similar case, State v. Reasoner,

154 Ariz. 377, 742 P. 2d 1363 (Ariz. App. 1987), the Arizona Court gave credence to a Colorado warrant in arresting Reasoner within his own home. It is unclear from Reasoner what the statutory requirements are in Arizona for the issuance of warrants and what effect, if any, Arizona statutes give to warrants of a foreign sovereignty. Perhaps the Arizona court has gone too far and has entered territories belonging to the Legislative Branch of Government.

In State v. Bradley, 106 Idaho 358, 679 P. 2d 635 (1983), cert denied 464 R.S. 1041 (1984) this very issue was before this court and the writ of certiori was denied.

III. THE COURT BELOW APPLIED THE APPROPRIATE STANDARD AS TO EXIGENT CIRCUMSTANCES

The Supreme Judicial Court's conclusion that there were no exigent circumstances to justify a warrantless entry

into Derosia's mother's home was correct. A review of the facts as outlined in the Petition prepared by the Commonwealth (See Commonwealth's brief p. 3) provides evidence that the police had ample time to obtain an arrest and search warrant for Derosia. The police had knowledge that Derosia was at his mother's home at least an hour and a half prior to the defendant's arrest. Also, the police had spoken with an assistant clerk about the situation. A police officer was dispatched to watch the defendant's mother's home shortly after learning of Derosia's presence there, and there is no indication that Derosia even knew of the police presence. Upon his arrest, within his mother's home, the defendant offered no resistance. The guidelines suggested in Dorman v. United States, 435 F. 2d 385 (D.C. Cir. 1970) for determining whether exigent circumstances were present which would excuse the lack of a warrant, have been adopted

by the Supreme Judicial Court in Commonwealth v. Forde, 367 Mass 798, 329 N.E. 2d 717 (1975) and Commonwealth v. Pietras, 392 Mass 892, 467 N.E. 2d 1368 (1984).

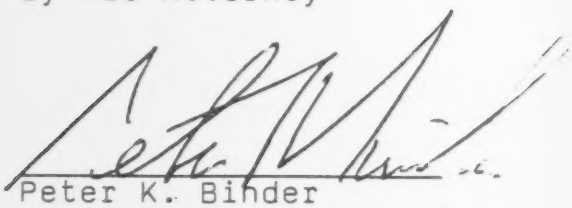
It must be assumed that these guidelines were reviewed by the Supreme Judicial Court when it concluded that "...there were no exigent circumstances to justify a warrantless entry into the dwelling of the defendant's mother". Commonwealth v. Derosia, 402 Mass 284, 522 N.E. 2d 408 (1988). Here petitioner has failed to frame an issue that could be made the basis of a writ of review.

CONCLUSION

For the foregoing reasons, the petition of writ of certiori to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts should be denied.

Respectfully submitted,

LEO A. DEROSIA,
By his Attorney



Peter K. Binder
(Nancy M. Martin with him)
BINDER & MARTIN
38 Parker Street
Gardner, MA 01440
(508) 632-7939